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No. _____

In the Supreme Court of the United States

October Term, 1984

PAUL E. ARBOGAST,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jurisdictional Statement Of Petitioner Paul E. Arbogast

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QUESTION PRESENTED

Whether the Sixth Amendment to the United States Constitution is violated where the Government's proof at trial varied significantly from its earlier representations as to the conspiracy alleged in the indictment, causing petitioner Arbogast, who had little more than a week for trial preparation, to divert his efforts in attempting to formulate a defense to what the Government had represented rather than to that on which it ultimately offered proof.

LISTING OF PARTIES

No listing of parties is required pursuant to Rule 15.1(b) of the Supreme Court Rules because all of the parties are listed in the caption.

JOINDER OF PETITIONS FOR A WRIT OF CERTIORARI ARISING FROM THE SAME JUDGMENT

Pursuant to Rule 19.4 of the Supreme Court Rules, petitioner Paul E. Arbogast hereby joins in the petitions for a writ of certiorari submitted by Lord Electric Company, Inc., Joseph J. Rodgers, Sargent Electric Company, Inc., Frederic B. Sargent and Ralph D. Vryenhoek.

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No. _____

In the Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,
Respondent,

v.

FISCHBACH AND MOORE, INC., *et al.*,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Paul E. Arbogast respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 10, 1984. Said order affirmed the judgment of the United States District Court for the Western District of Pennsylvania, which found petitioner Arbogast guilty of combining and conspiring in unreasonable restraint of interstate trade and commerce under 15 U.S.C. § 1.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit, dated December 10, 1984, affirming Petitioner Paul E. Arbogast's conviction appears as Appendix A hereto. That order was modified by the Third Circuit by order dated December 19, 1984, attached hereto as Appendix B. The order of the United States District Court for the Western District of Pennsylvania, dated April 19, 1984, appears as Appendix C hereto. The portion of the District Court's bench addressing the Bill of Particulars issue, dated December 22, 1983, appears as Appendix D hereto.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Third Circuit was entered on December 10, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1241(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

1. Procedural History

The indictment in this antitrust case was filed on July 1, 1983 and consists of one count. It alleges that the defendants violated 15 U.S.C. § 1 by fixing prices, allocating and rigging bids on projects at the Western Pennsylvania Works of United States Steel Corporation during a period from about 1974 until about 1981. Defendant Paul E. Arbogast pleaded not guilty to this charge at his arraignment on July 15, 1984, as did all other defendants.

On Feburary 1, 1984, the District Court accepted pleas of guilty by the Howard P. Foley Co. and of nolo contendere by E. C. Ernst Co. The Foley plea was made pursuant to a series of plea agreements whereby Foley would plead guilty and agree to pay a million dollar fine in each of three cases in return for a promise of non-prosecution for antitrust violations occurring before the date of the plea agreements.

Trial commenced on February 6, 1984 and the District Court granted a motion for judgment of acquittal by defendants James Osterle and Tri-City Electric Co., Inc. at the close of the Government's case in chief. The jury returned a verdict of guilty to all remaining defendants, including petitioner Arbogast, on March 7, 1984. On April 19, 1984, the Court sentenced Mr. Arbogast to two years imprisonment, all but three months of which were suspended and four years probation. In addition, Mr. Arbogast was fined $50,000, plus one-seventh of prosecution costs.

On April 27, 1984, petitioner Arbogast and the other defendants filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. Following oral

argument on October 3, 1984 before Judges Aldisert, Hunter and Weis, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court in all respects.

On December 27, 1984, petitioner Arbogast filed a Motion for Stay of Mandate to the United States Court of Appeals for the Third Circuit, and on January 8, 1985, the Third Circuit stayed the issuance of the mandate, pending notification that this petition was filed with the Supreme Court clerk by January 30, 1985.

2. Statement of Facts Relevant to Petitioner Arbogast

The indictment in this case alleged a conspiracy from 1974 until about 1981 to allocate, fix prices and submit rigged bids on "electrical construction projects at the Western Pennsylvania Works of U.S.S. [United States Steel Corporation]." The indictment identified six plants as constituting the Western Pennsylvania Works, but failed to specify which "electrical construction projects" were the subject of the conspiracy. Faced with preparing a defense involving at least 200 electrical construction projects covered by the indictment period, the defendants moved for a bill of particulars on September 16, 1983 to specify which projects the government claimed were the subject of the conspiracy. At the hearing on this motion, the government represented several times that there was no need for a bill of particulars because the indictment expressly charged that the conspiracy involved *all* electrical construction projects at the Western Pennsylvania Works. The district court, however, ordered the government to provide a bill of particulars, expressing concern "with the number of projects bid on over a seven-year period during which the

conspiracy allegedly took place," *United States v. Fischbach and Moore, Inc.*, 576 F. Supp. 1384, 1389 (W.D. Pa. 1983).

While the government continued to define broadly the scope of the indictment, Paul Arbogast was a defendant in a case brought by the United States, entitled *United States of America v. Fischbach and Moore, Inc., et al.* at No. CR83-169c in the District Court of Montana, charging Mr. Arbogast with having violated Section 1 of the Sherman Act, 15 U.S.C. § 1. That trial, commencing in mid-November, 1983, lasted until Mr. Arbogast's acquittal on January 21, 1984.

When it became apparent that the nine-week Montana trial would reduce Mr. Arbogast's time for preparation in the Pittsburgh case, which was scheduled to commence on February 6, 1984, Mr. Arbogast filed a motion for a two-week postponement of trial. In his motion, filed on January 18, 1984, Mr. Arbogast represented that because of the complexity and duration of the Montana trial, he had not had an opportunity to begin trial preparations, which included a review of at least 15,000 documents and numerous grand jury transcripts. Furthermore, Mr. Arbogast noted that his attorney in Montana had developed a severe illness, and would be unable to represent Mr. Arbogast in the upcoming trial, and, as a result, Mr. Arbogast would have to first become acquainted with a new attorney, shortly before trial. Nevertheless, the court denied Mr. Arbogast's motion on January 23, 1984.

Following his acquittal on January 21, 1984, Mr. Arbogast left Montana to recuperate and become reacquainted with his family, which resides in Portland, Oregon. After his one week respite, Mr. Arbogast first had an opportunity to review with counsel the government's bill

of particulars, which were issued on January 19, 1984, and listed sixty-five (65) jobs by specification number. Faced with the enormity of preparing an adequate defense within this period, Mr. Arbogast filed a motion for reconsideration of the order denying his motion for postponement of trial on January 30, 1984. This motion contained an affidavit from Mr. Clyde Armstrong, Mr. Arbogast's attorney during the Montana trial, who averred that as of January 30, 1984, Mr. Armstrong or Mr. Arbogast's new attorney, William Wycoff, had not had an opportunity to work with Mr. Arbogast in the preparation of his defense. Nonetheless, the Court again denied Mr. Arbogast's motion. Trial commenced on February 6, 1984.

On the first day of trial, the government filed a supplemental and amended bill of particulars which deleted six of the previously identified projects and added five projects, two of which were already on the original bill.

At the start of trial, while Mr. Arbogast was still attempting to ascertain which contractors had bid on projects listed on the original and supplemental bills of particular, the government surprised everyone in the opening statement, by telling the jury that the alleged conspiracy involved only those jobs involving a compatible list of bidders. Following the testimony of its witnesses, the government asserted that it had established that the defendants had conspired to rig a limited number of jobs, only those in which the defendants were the only bidders.

Following the presentation of the government's proof, which focused on the conspiracy as first defined in the opening statement, Mr. Arbogast's counsel argued a motion for judgment of acquittal, asserting that the government's conduct had amounted to a constructive

amendment or a prejudicial variance. Again he emphasized Mr. Arbogast's inadequate preparation time for a trial as complex as the instant one. However, the Court denied Mr. Arbogast's motion, and again denied Mr. Arbogast's motions for judgment of acquittal at the close of all the evidence.

The jury returned guilty verdicts against all of the defendants whose cases went to the jury. Mr. Arbogast, in a second motion for acquittal, again reiterated the consequences of the variance, made more severe by the inadequate preparation time. Again, however, the court denied his motion.

Thereafter, the court sentenced Mr. Arbogast to two years imprisonment, such sentence being suspended with the exception of three months followed by probation for four years. Further, the court ordered Mr. Arbogast to pay a fine of $50,000 and one-seventh 1/7 of the costs of prosecution.

Following an appeal to the United States Court of Appeals for the Third Circuit, that court affirmed Mr. Arbogast's conviction, although it failed to address the issue of prejudicial variance as it affected Mr. Arbogast.

REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the Third Circuit failed to consider how the variance between what the government represented and that on which it ultimately offered proof affected petitioner Arbogast. Mr. Arbogast was prejudiced uniquely because the government knew that he had an exceptionally short trial preparation period because of his involvement in another case, and

nonetheless mislead Mr. Arbogast, rendering an adequate presentation of his defense impossible.

ARGUMENT

A PREJUDICIAL VARIANCE EXISTS WHERE THE GOVERNMENT'S PROOF AT TRIAL VARIED SIGNIFICANTLY FROM ITS EARLIER REPRESENTATIONS AS TO THE CONSPIRACY ALLEGED IN THE INDICTMENT, CAUSING PETITIONER ARBOGAST, WHO HAD LITTLE MORE THAN A WEEK FOR TRIAL PREPARATION, TO DIVERT HIS EFFORTS IN ATTEMPTING TO FORMULATE A DEFENSE DIRECTED TO WHAT THE GOVERNMENT HAD REPRESENTED, RATHER THAN TO THAT ON WHICH IT ULTIMATELY OFFERED PROOF.

A. Standards of Review

A variance of an indictment occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. *United States v. Somers,* 496 F.2d 723, 743, n. 38 (3d Cir. 1974) *cert. denied,* 419 U.S. 832 (1974) citing *Gaither v. United States,* 413 F.2d 1061, 1071 (D.C. Cir. 1969). A variance constitutes reversible error when it serves to prejudice the defendant. *Berger v. United States,* 295 U.S. 78, (1935); *Kotteakos v. United States,* 328 U.S. 750, (1946).

In determining whether a variance has prejudiced a defendant, a court must focus on whether the defendant was so surprised by the proof adduced at trial that he was unable to prepare his defense adequately. *Berger v. United*

States, 295 U.S. at 82. *United States v. Somers*, 496 F.2d at 745-746.

B. Application of Standards of Review to Petitioner Arbogast's Situation

Given the government's representations as to the scope of the indictment, its numerous redefinitions of what it intended to prove at trial and Paul Arbogast's one week preparation time, there can be no question that Mr. Arbogast was so surprised by the proof ultimately offered by the government that he was unable to prepare his defense adequately.

A criminal prosecution is not a game where the government can charge an individual with a crime based on vague assertions. Thus, the Sixth Amendment of the Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation [against him]." Where the indictment is vague, Fed.R.Crim.Proc. 7(f) provides a defendant with the opportunity to obtain a clarification in the form of a bill of particulars in order to avoid surprise at trial. Accordingly, the primary purpose of the bill of particulars is to inform a defendant of the charge against him to avoid surprise to the defendant. *United States v. Addonizio*, 515 F.2d 49 (3d Cir. 1975). The information contained in a bill of particulars clarifying a vague indictment is not a gift to an accused; a defendant "is entitled to this information in order properly to prepare to meet the charges and to avoid surprise upon the trial." *United States v. Spur Knitting Mills, Inc.*, 187 F. Supp. 653, 654 (S.D. N.Y. 1960) (Weinfeld, J.). *See also United States v. Felizi-ani*, 472 F.Supp. 1037, (E.D. Pa.); aff'd, 622 F.2d 580 (3d Cir. 1979). Thus, a bill of particulars:

> '[O]nce obtained . . . concludes the rights of all parties who are to be affected by it, and he who has furnished the bill of particulars under it, must be confined to the particulars he has specified, as closely and effectively as if they constituted essential allegations in a special declaration.' Otherwise stated, a bill of particulars strictly limits the prosecution to proof within the area of the bill.

United States v. Neff, 212 F.2d 297, 309 (3d Cir. 1954). See also *United States v. Boffa,* 513 F. Supp. 444, 485 (D.C. Del. 1980); *aff'd* 668 F.2d 919 (3d Cir. 1982), citing *Neff and United States v. Allied Asphalt Paving Co.,* 451 F. Supp. 804, 812 (N.D. Ill. 1978).

Significantly, as the Court noted in *Allied Asphalt Paving,* the government is bound by the particulars specified in a bill of particulars whether or not a court ordered the government to produce the bill. *United States v. Allied Asphalt Paving Co.,* 451 F. Supp. 804, 812-813 (N.D. Ill. 1978) ("[w]hether or not in a Sherman Act case like this one the government need file a bill of particulars, having filed one in response to a motion, defendants are entitled to rely on it until it is validly amended.") This rule is consistent with the concerns expressed in the Sixth Amendment and decisions cited herein that our judicial system places great importance on avoiding surprise at a criminal trial.

From a defendant's perspective, there is little difference in receiving a bill of particulars simply in response to a defendant's motion and obtaining an oral representation of government counsel concerning the scope of the indictment in a hearing on the merits of a motion for a bill of particulars. In both situations, the government is expressing its version of what must be proven to establish the

charges contained within the indictment, and a criminal defendant must be allowed to rely on that clarification. One court, in *United States v. Deerfield Spec. Papers, Inc.*, 401 F. Supp. 796, 809 (E.D.Pa. 1980), noted the similarity between a bill and a government statement concerning the indictment by stating that "a statement describing the nature of the conspiracy whether oral or written" is a factor that a court must consider in determining whether the government has adequately clarified the nature of the offense charged to render a bill of particulars useless in enabling a defendant adequately to prepare his defense.

A review of the government representations from Mr. Arbogast's perspective clearly indicates the existence of a prejudicial variance. The indictment here charged the defendants with conspiring from about 1974 to 1981 to allocate, to fix prices on, and to submit rigged bids on "electrical construction projects at the Western Pennsylvania Works of U.S.S. [United States Steel]." When the lead government counsel, Mr. Hays Gorey, on October 17, 1983, argued in court against defendants' motion for a bill of particulars, he very clearly said:

> MR. GOREY: The charge in the case—and I think this is an important point I would like to make to the Court—is a conspiracy to rig all jobs during the relevant period at the specified Western Pennsylvania plants of United States Steel Corporation.
>
> THE COURT: And you are saying that all of these defendants wanted to rig all of these jobs?
>
> MR. GOREY: That is correct, Your Honor. That is the charge. . . Again, *the indictment alleged an agreement to rig all those jobs.*

(Emphasis added).

Mr. Gorey's explanation of the government's case was by no means isolated. Earlier in that hearing, Mr. Gorey's co-counsel, Mr. Gary Humble responded similarly to a question asked by the Court:

> THE COURT: By reading this indictment and by looking at the material that the government has submitted to the defendants, do the defendants know what jobs the government is talking about? Where the bidding was allegedly rigged?
>
> MR. HUMBLE: Yes sir, Your Honor. The defendants know that *every* electrical construction job from 1974 to 1981 at these plants that are charged in the indictment [was rigged].
>
> THE COURT: Every job?
>
> MR. HUMBLE: Yes sir.

(Emphasis added.) In fact, Mr. Humble later added that the defendants "should be prepared to defend on every job." These representations were significant because U.S. Steel had solicited bids on 207 electrical construction jobs during this period. Lord Electric Co., petitioner Arbogast's employer, had bid on substantially all of these jobs.

While the other defendants awaited Judge Cohill's order regarding the disposition of pre-trial motions, including the motion for a bill of particulars, Paul Arbogast already had begun the Montana trial. At that time, even if he had had time to direct his attention from his defense, he knew only that the government in the Pittsburgh trial intended to prove that he was a member of a conspiracy to rig all electrical construction jobs at the Western Pennsylvania Works of United States Steel over eight years.

On December 22, 1983, the trial court ordered the government to produce a bill of particulars, noting that "the purpose of a bill of particulars is to inform defendant(s) of the nature of the charges brought against him to adequately prepare his defense [and] to avoid surprise at trial." *United States v. Fischbach and Moore, Inc.*, 576 F. Supp. 1384, 1388 (W.D. Pa. 1983). The government provided the bill of particulars on January 19, 1984.

As described in the Statement of Facts, Mr. Arbogast was first able to review the government's bill of particulars in the Pittsburgh trial, one week before the trial's commencement. That bill listed sixty-five projects which the government claimed "were within the scope of the conspiracy alleged in the indictment," and expressly provided that the government "believes United States Steel Corporation let contracts for electrical construction services which were within the scope of the conspiracy and are not contained in this bill of particulars." The bill did not define "scope" or state that a commonality existed among the listed projects distinguishable from all non-listed jobs. Thus, the bill of particulars was not necessarily inconsistent with the government's earlier representations. Not surprisingly, therefore, in his one week to prepare for trial, Paul Arbogast anticipated that the government would offer proof that Mr. Arbogast conspired to rig all United States Steel jobs in Western Pennsylvania. In Paul Arbogast's eyes, he still had to prepare to defend against the universe.

As if a one-week preparation period for a complex, antitrust case would have given a defendant an undue advantage on the first day of trial, the government amended its bill of particulars, adding five projects, two of which were already on the original bill of particulars, but

dropping six of the originally listed projects. The government gave no reason for its amendment.

At trial, the government's case for the first time was revealed to be a conspiracy conditioned on whether the defendants could work with those companies on the bidders list. The first indication that the government had misled the defendants came in the government's opening statement when the defendants heard the government tell the jury:

> Once the people in authority at the electrical construction companies knew who the list of bidders were, they could make a decision and make a determination as to whether this was a group of bidders that would work with the conspiracy, and, therefore, agree to rig the job.

Ultimately at trial the government offered proof with regard to twenty-two projects, two of which were affirmatively established as being outside the scope of the conspiracy. Significantly, the government abandoned its earlier position that it intended to prove a conspiracy to rig *all* United States Steel jobs.

This variance significantly prejudiced Paul Arbogast. As discussed herein, Mr. Arbogast had one week to prepare a defense in an extremely complicated case requiring the review of thousands of documents. As Mr. Arbogast testified, his company, Lord Electric, had bid on substantially all of the electrical construction contracts at the United States Steel Western Pennsylvania Works between 1974 and 1981. The amount of work that Mr. Arbogast had to undergo with his attorneys simply was awesome. Simply

ascertaining who bid on the sixty-five jobs on the government's bill of particulars, listed only by date and specification number, required a tremendous amount of time; more than one week. Nothing establishes the complexity and time consuming nature of a trial of this type more than the fact that the government interviewed one of its witnesses, Richard Perrott on at least seven days totalling forty-seven hours. That is practically the equivalent period of time Paul Arbogast had to defend against the government's charges.

Because the government had represented that it would prove a conspiracy to rig all projects, Mr. Arbogast devoted his limited time to prepare a defense that would establish that such a conspiracy did not exist. Mr. Arbogast intended to present evidence indicating that particular jobs were not the subject of any conspiracy thereby establishing that the enormous conspiracy alleged by the government at the pretrial hearing did not exist. There is no question that Paul Arbogast was surprised when he learned for the first time at trial that his strategy would not be an adequate defense to the government's new definition of the material facts.

Thus, the government's broad representations as to the material facts required by the indictment resulted in an unnecessarily broad charge against which to prepare to defend, especially given Mr. Arbogast's extremely limited period for preparation. Furthermore, the representations had the effect of causing Mr. Arbogast to spend his limited time on a defense that no longer became applicable once the government reinterpreted the indictment. Given these facts and Mr. Arbogast's continual requests for a continuance, this case falls squarely under the holding in *United States v. Somers*, 496 F.2d at 746, where, in rejecting an

appellant's argument of prejudicial variance, the court noted:

> Our conclusion might well be different had [the defendant] been attempting to develop an alibi defense during this period... Our conclusion that counsel had sufficient time is fortified by the fact that [the defendant's] counsel did not request a continuance... We are confident that had counsel felt more time was required to analyze or deal with (the testimony that was the subject of the claim of prejudicial variance), an application would have been made to the Court.

Given Mr. Arbogast's unique time constraints, there clearly was a prejudicial variance causing him surprise at trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals of the Third Circuit dated December 10, 1984.

Respectfully submitted,

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Dated: January 30, 1985

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

**Nos. 84-3242, 84-3243, 84-3244,
84-3253, 84-3266, 84-4367 and 84-3268**

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E. C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Appellant in No. 84-3253

PAUL E. ARBOGAST,

(D.C. Crim No. 83-0009-08)

OPINION OF THE COURT

ALDISERT, Chief Judge

Three principal issues are presented in this appeal from sentences imposed on a guilty verdict in a criminal anti-trust prosecution: whether the proof at trial varied from the indictment charging a single, continuing conspiracy; whether the government introduced sufficient evidence to prove the interstate commerce element of the Sherman Act violation; and whether this court should set aside or modify, on appeal, the one million dollar fine levied against defendant Fischbach & Moore. Appellants assert several less significant arguments, including the admission of an allegedly prejudicial government exhibit; prosecutorial misconduct during closing argument; errors in jury instructions; and the denial of a continuance to defendant Arbogast. Because we find no reversible error, we affirm the judgment of the district court.

I.

For approximately seven years, from 1974 to 1981, representatives of several electrical contracting companies met at the Duquesne Club in Pittsburgh. The purpose of these meetings was to allocate electrical construction projects, by bid rigging, at the Western Pennsylvania Works (Works) of United States Steel (USS). Whenever one of the companies desired to rig a bid, that company's representative would telephone the other contractors and arrange a meeting. After deciding among themselves which firm would receive the contract, that firm's representative would contact the other contractors and would tell them what bid to submit, ensuring that his firm's bid would be the lowest. Some of the first kept track of the allocations to

ensure that each contracting company received its fair share of work.

As a result of investigating this bid rigging scheme, the government accused a number of the electrical contractors and their employees of antitrust violations. The indictment charged them with violating § 1 of the Sherman Act by conspiring to allocate electrical construction projects at the Western Pennsylvania Works, to fix the prices at which those projects were bid, and to submit noncompetitive, collusive, and rigged bids on those projects. Although some of the defendants plea bargained to the charges and avoided trial, three electrical contracting companies, Fischbach and Moore (F&M), Sargent Electric, and Lord Electric, and four individual employees, Paul Arbogast, Joseph Rodgers, Frederic Sargent and Ralph Vryenhoek, stood trial on the charges. They are the appellants before us.

Prior to trial, one of the defendants, Paul Arbogast, was indicted and prosecuted in Montana for an unrelated Sherman Act violation. The district court postponed the Western Pennsylvania trial once because of the Montana action. In mid-January 1984, Arbogast again moved for a continuance, the Montana trial not having ended and the Western Pennsylvania trial scheduled to begin in early February. The court denied this motion. Arbogast was acquitted in Montana on January 21 and began trial in Pittsburgh on February 6.

To narrow the scope of the trial, the government issued a bill of particulars, which it later amended, identifying contracts within the scope of the conspiracy. The proof at trial related to some, but not all, of the contracts

on this list. The government also introduced extensive evidence to prove the interstate commerce jurisdictional element. This evidence included Government Exhibit 32 (Govt. Ex. 32), a file of invoices and freight bills for electrical materials and equipment bought by USS from out of state vendors for use in electrical construction projects at the WPW.

After a finding of guilty by the jury, the district court imposed both fines and prison sentences on the individual defendants. The three corporate defendants received fines of one million dollars each, the statutory maximum under § 1 of the Sherman Act. Defendants now appeal their convictions, and have asserted a long list of contentions, requiring this opinion to be more lengthy than what we believe to be appropriate in this court.

II.

Appellants raise three principal contentions. First, appellants F&M, Lord Electric, Sargent Electric, Paul Arbogast and Joseph Rodgers allege a variance between the proof and the indictment. In a related argument, F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent allege that the government did not prove the interstate commerce element of the Sherman Act charge. In the third major contention, F&M alleges both that its sentence was illegal and that the trial court abused its discretion in imposing sentence.

The precepts guiding our review of the variance argument are familiar. Our polestar is to determine whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir. 1980) (quoting *Burks v. United States*, 437 U.S. 1, 17

(1978)), *cert. denied*, 450 U.S. 967 (1981). Additionally, *Kotteakos v. United States*, 328 U.S. 750 (1946), sets forth the two-pronged test appellants must meet to succeed in this specific contention: (1) that there was a variance between the indictment and the proof and (2) that the variance prejudiced some substantial right of the defendants. *Id.* at 752, 756.

In the usual criminal case, our review of a sentence imposed by the district court is extremely circumscribed. *United States v. Felder*, 706 F.2d 135, 137 (3d Cir. 1983)[1].Generally, if the sentence falls within the statutory maximum, the matter is not reviewable on appeal, *United States v. Dickens*, 695 F.2d 765, 782 n.26 (ed Cir. 1982), cert. *denied*, 103 S. Ct. 1792 (1983). We may review the sentence, however, if there is a showing of illegality or abuse of discretion. *United States v. Fessler*, 453 F.2d 953, 954 (3d Cir. 1972). We now consider appellants' variance argument.

III.

Appellants F&M, Lord Electric, and Sargent Electric argue that because the government's evidence sought to establish multiple conspiracies and not the single, continuing conspiracy charged in the indictment, the convictions must fall as illegal. They allege variance in two respects: (1) that the government interpreted the indictment to charge that all electrical contracting bids were rigged during the time of the conspiracy, later reducing the number of bids in the bill of particulars and further reducing them at trial and (2) that the government proved not one continuing

[1] *But see* Sentencing Reform Act of 1984, Pub. L. No. 88473, 213(a), 98 Stat. 1837, ____ (to be codified at 18 U.S.C. 3742(a) (effective Nov. 1, 1986) (will allow review of sentences under limited circumstances after Act's effective date).

conspiracy, but a series of independent conspiracies, i.e., that each contract the government proved the defendants rigged constituted a separate conspiracy.

A.

The indictment charged that the defendants conspired to "allocate among themselves electrical construction projects" at the Works: to "fix the prices at which electrical construction projects" were bid; and to "submit noncompetitive, collusive, complementary and rigged bids." App. at 21a-22a. But the indictment did not state that the conspiracy encompassed all bids or all contracts made during the seven-year period. Although the government so stated at a pre-trial conference, even if the appellants relief on these government representations or the bill of particulars as to the extend of proof, neither can modify the scope of the indictment. *United States v. Critchley*, 353 F.2d 358, 362 (3d Cir. 1965) (bill of particulars).

Even had the indictment read in terms of "all construction projects" and "all bids," the government still would have introduced sufficient evidence to prove the crimes charged. To prove a conspiracy to rig all bids, the government was not required to show that the defendants actually rigged all bids. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n.59 (1940). The defendants could have conspired to rig all bids, but failed to achieve that objective for one reason or another, e.g. because the bid lists included companies with which the defendants could not cooperate. Evidence of the fourteen rigged bids both proved that a conspiracy to rig bids existed and permitted the jury to conclude that the conspiracy encompassed all bids.

B.

We also conclude that the government introduced sufficient evidence to justify a jury finding of only a single conspiracy. The government proved that the defendants met, over a period of several years, at the Duquesne Club for the sole purpose of rigging bids and allocating contracts. The government introduced evidence to prove that all the participants knew the purpose of the club meetings and that they met as a group, thus negating the argument that separate groups of the defendants were conspiring together, with the same goal, but with their actions unconnected. More important, the government showed that some of the defendants kept records of which company received which job, ensuring that each firm would receive its fair allotment of the contracts. This recordkeeping indicated a single conspiracy that continued over time, and not separate conspiracies involving only certain contracts.

Because we hold that defendants did not prove a variance between the proof and the indictment, we need not consider the prejudice prong of *Kotteakos*.

C.

In a related argument, appellant Arbogast maintains that the proof varied from the indictment in that the government proved one conspiracy, but that conspiracy had no effect on interstate commerce. As support for this contention, Argobast expressly declines to rely on *Kotteakos*, conceding that he suffered no prejudice from the variance alleged. Instead, Arbogast relies on the language of the Sherman Act requiring the conspiracy to restrain "trade or commerce among the several States." 15 U.S.C. § 1.

As we understand his argument, he contends that the government proved a single agreement to rig bids only at the time one of the defendants would telephone the others to arrange a meeting. This agreement, Arbogast states, was harmless and restrained no trade. Rather, the ensuing agreements reached at the meetings restrained trade, but those fourteen separate agreements were not charged in the indictment. We decline to adopt this convoluted construction of the offense charged in the indictment.

The Arbogast argument starts to collapse when he concedes, as he does, that he conspired to fix bids when one of the other conspirators made a telephone call. Because we cannot isolate the original telephone call with the subsequent action triggered by the call, the keystone of his argument falls out. These telephone calls and the meetings that followed were an integral part of the conspiracy to fix bids, to which he agreed. To view the conspiracy in terms of artifical separate and distinct phases would give no meaning to the agreement into which Arbogast entered and for which he was indicted. Had the defendants not contemplated making the telephone calls, no reason existed for them to agree to rig bids if the calls were made. Rather, the calls and Duquesne Club meetings constituted concerted activity to further the conspiracy to rig bids. As such, anticompetitive effects of these actions cannot be separated from the initial agreement to rig bids.

IV.

In a more particularized argument, defendant Rodgers contends that the government did not introduce evidence sufficient for the jury to find that he knowingly joined the continuing conspiracy charged in the indictment. He

argues that he began to attend the Duquesne Club meetings only as a casual observer to protect the interest of his company Foley Electric and that his appearance was long after the other defendants entered into a conspiracy. To join a conspiracy, the government generally must prove two different types of intent: (1) the basic intent to agree, which is necessary to establish the existence of the conspiracy and (2) the more traditional intent to effectuate the object of the conspiracy. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

In a situation very similar to that of Rodgers, in *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), defendants were convicted of a 26-year continuing conspiracy to fix the price of consumer bags. One defendant, Chase Bag, maintained that the government had introduced insufficient evidence to support its conviction, arguing that its behavior was legitimate price followership. *Id.* at 448. We affirmed Chase Bag's conviction, basing our decision on, among other things, Chase Bag's adoption of an unpublished price list of a competitor, St. Regis. We stated:

> Had the St. Regis incident been the only evidence against Chase Bag, we might agree that the government's proof varied substantially from the indictment. We note, however, that Chase Bag's participation in various meetings where prices were discussed, its exchange of price information with competitors, and its parallel pricing policies, although perhaps innocent by themselves, are cast in a different light by [Chase Bag's] apparent agrement with [St. Regis] to fix prices.

Id. at 455.

Although the issue is close, we are persuaded that the government introduced sufficient evidence to demonstrate

that Rodgers knowingly entered the continuing conspiracy. Although he joined the Duquesne Club meetings at a point far into the conspiracy, his purpose in going there was to obtain contracts (specifically the contract designated as Gov. Ex. 23) for his company, Foley Electric. After it was agreed that Foley was to be the low bidder on this contract, Rodgers arranged the bid submissions on this contract by telephoning the other companies and telling them what prices to bid. The most damning evidence against Rodgers was his alleged reason for wanting this particular contract: "because he had cooperated with other people at the meeting and he felt that he should be given some consideration." App. at 1826a-27a. Viewed in the light most favorable to the government, this remark evidences Rodger's knowledge both of the continuing nature and goals of the conspiracy and his intent to join the conspiracy and further its objectives. Rodger's actions only confirm his understanding of and familiarity with the conspiracy.

If the testimony pertaining to Govt. Ex. 23 was the only evidence on which the government relied, perhaps Rodgers would have had a stronger case. *See, e.g.* the one-time only exception we suggested in *Continental Group*, 603 F.2d at 455. But here the government introduced evidence of Rodger's involvement with another rigged contract, designated as Govt. Ex. 27. Although testimony was conflicting as to whether the contract was rigged over the phone or at a club meeting, viewed in the light most favorable to the government, the jury could have found that Rodgers also participated in rigging this contract. We therefore concluded that substantial evidence existed to tie Rodgers to the conspiracy.

We now turn to appellants' interstate commerce argument.

V.

Appellants F&M, Lord Electric, Ralph Vryenhoek and Frederic Sargent argue that the government did not prove the interstate commerce element of the Sherman Act charge.

Section 1 of the Sherman Act proscribes "every contract, combination . . ., or conspiracy, in restrain of trade or commerce among the several States . . . ." 15 U.S.C. § 1. The government may prove the connection of the restraint to interstate commerce under either of two independent theories. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). An "in commerce" theory requires that the government prove that (1) a substantial volume of interstate commerce is involved with the challenged activity and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects. *Id.* at 244. An "effect on commerce" theory, applies to primarily intrastate activity. The government must show that (1) a substantial amount of interstate commerce was involved and (2) the challenged activity has a "not insubstantial effect" on interstate commerce. *Id.* at 245-46; see also *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983).

The government may prove the nexus between interstate commerce and the challenged activity through either the activities of the target of the antitrust violation or defendant's activities. *Id.* at 75. Because the activities involved in this case, price-fixing and bid rigging, are *per se* violations, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (price fixing); *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979) (bid rigging); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) (bid

rigging), the government is not required to prove any adverse impact on interstate commerce. *Northern Pacific*, 356 U.S. at 5.

Based on the trial testimony, we hold that the government introduced substantial evidence to support a jury finding that either the electrical contracting services were in commerce or that the defendants' activities affected interstate commerce. As to the in commerce theory, the government introduced evidence to show that the contractors and USS ordered substantial amounts of materials from out of state for use on the USS jobs. Not only pieces of equipment used in the Works jobs cost tens of thousands of dollars, but often showed that materials were shipped directly from out-of-state manufacturers to USS job sites. The electrical contracting services thus involved a substantial amount of interstate commerce. Because the materials were shipped into the state solely in connection with the contracting jobs, and were otherwise useless, the contracting services were an essential, integral part of interstate commerce.

Moreover, the evidence also serves to prove the interstate element of the Sherman Act by satisfying the affecting commerce theory. Clearly, a large amount of materials used in the contracting jobs traveled through interstate commerce. *Per se* violations in the electrical contracting field involving USS would have a marked effect on interstate commerce, especially by shifting purchases from one contractor to another.

We next consider F&M's argument pertaining to its sentence.

VI.

F&M alleges both that its sentence was illegal and that the judge abused his discretion in imposing sentence. The illegality argument is based on the theory that the one million dollar fine is disproportionate, thus violating the eighth amendment. F&M contends that the judge abused his discretion by basing the fine on the one million dollar penalty accepted by another defendant, the Foley Company, as part of its plea bargain.

F&M relies on *Solem v. Helm*, ___ U.S. ___, (51 U.S.L.W. 5019, June 18, 1983), in arguing that its fine is disproportionate. The Supreme Court suggested three factors for a court to consider in reviewing a sentence for disproportionality: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *Id.* at ___, 51 U.S.L.W. at 5023. Evaluating these factors, we hold that the district court's sentence was not disproportionate and thus not illegal.

F&M brazenly committed a grave crime. The jury found the company guilty of conspiring to commit *per se* violations of the Sherman Act in a series of meetings that obviously were illegal. Moreover, F&M was one of the ringleaders of that conspiracy. As to the sentences imposed in the same jurisdiction, the penalties levied on the other defendants in this case provide a good example. Every individual defendant received a fine and a prison sentence; all the corporate defendants received one million dollar fines. Thus, in comparison, F&M's fine does not appear severe. Moreover, in comparing the sentence with those

received by defendants in other jurisdictions, F&M provided extensive statistics on the infrequency of the imposition of the maximum fine. These statistics, however, illustrate that defendants frequently are fined, and fined in large amounts. Although F&M's one million dollar fine is extensive, its amount was the expression of the Congress, not the judiciary. Accordingly, we hold that the fine is not disproportionate to the gravity of the offense, the public policy considerations implicated and the Congressional determinations.

F&M also contends that the district court abused its discretion by taking another defendant's punishment into account when fining F&M. F&M argues that because the judge gave no reasons for the fine imposed, it is reasonable to believe that he relied on improper motives. This court does not require a judge to elucidate his sentencing rationale.[2] *United States v. Del Piano*, 593 F.2d 539, 540 (3d Cir.) (per curiam), *cert. denied*, 442 U.S. 944 (1979). Nor does F&M offer any evidence, other than the speculations of its excellent lawyers, of the judge's reliance on improper factors in the sentencing process. In short, "aside from characterizing [the fine] as excessive, defendant[ ][has] presented no reason which would justify a conclusion that the sentence[ ] [was] anything other than the result of a proper exercise of judicial judgment." *Government of the Virgin Islands v. Rodriquez*, 423 F.2d 9, 11 (3d Cir. 1970). For the above reasons, we decline to set aside F&M's sentence.

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[2]*But see* Sentencing Reform Act of 1984, Pub. L. No. 98473, § 212(a)(2), 98 Stat. ____, ____ (1984) (to be codified at 18 U.S.C. § 3553(c) (effective No. 1, 1986) (court will be required to "state in open court the reasons for its imposition of the particular sentence" after the Act's effective date).

VII.

We now consider defendants' remaining arguments in turn.

A.

Lord Electric contends that the district court should not have admitted Govt. Ex. 32, the file of purchase orders and invoices, because the exhibit was irrelevant. Additionally, it argues that even if Govt. Ex. 32 were relevant, the evidence was prejudicial and the trial judge should have excluded the exhibit pursuant to Rule 403, Federal Rules of Evidence. Because the initial relevancy decision implicates the interpretation and application of legal precepts, our review is plenary. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 269 (3d Cir. 1983); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102-03 (3d Vir. 1981). The Rule 403 decision, however, is reviewed under an abuse of discretion standard. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 269-70.

For evidence to be admissible under Rule 402, it must be relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, F. R. Evid. The Government sought to introduce exhibit 32 to prove the interstate commerce element of Sherman Act jurisdiction.

As noted earlier, and contrary to what defendant Lord asserts, the interstate commerce activities of the target of the antitrust violation, as well as the defendant, are relevant to a finding on the interstate commerce element.

Cardio-Medical Associates, 721 F.2d at 74. Because this evidence tended to make the existence of the consequential fact of involvement with interstate commerce more probable than if the evidence were not available, Govt. Ex. 32 was relevant.

Yet even if evidence is relevant, the court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, F. R. Evid. The defendant argues that Govt. Ex. 32 was more prejudicial than probative because the jury could not identify which invoices and freight bills related to the contracts at issue. The jury thus could have believed that evidence of every purchase of materials in interstate commerce contained in the file was relevant to proving the interstate commerce element of the crime.

Contrary to what Lord asserts, the jury could tie interstate purchases to particular contracts by matching a project number to a job number. Although the process might be time consuming and the correlation not always perfect, this procedure removed the prejudice about which defendant was concerned, and tilted the balance in favor of admissibility.

B.

Sargent Electric argues that it is entitled to a reversal because of allegedly improper remarks made by the prosecutor during his closing argument. In evaluating the prosecutor's comments, our standard of review is "whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights."

United States v. Scarfo, 685 F.2d 842, 849 (3d Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

Sargent isolates three instances of misconduct to substantiate its contention. It states that the prosecutor expressed his subjective feelings as to its guilt, yet identifies no page in the transcript where this occurred. The government points to one remark of the prosecutor's: "I submit to you that the defendants are guilty . . . on the facts and the evidence . . . ." App. at 3673A. By tying his remarks to evidence on the record, *United States v. Schartner*, 426 F.2d 470, 477 (3d Cir. 1970), the prosecutor's remarks were not prejudicial.

Likewise, defendant's claims regarding other comments are baseless. The statement by the prosecutor that "[w]hat I would like to do is summarize what I think the issues in the case are . . .," app. at 3610a, was merely a figure of speech, and not an injection of his personal feelings into the trial. The reference to Sargent Electric's financial reports, app. at 3651a, although the reports were not in evidence, was proper rebuttal to the defendant's assertion that it had made a complete financial disclosure to USS. *United States v. Somers*, 496 F.2d 712, 740 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

Sargent Electric makes one final related argument for reversal, arguing that the prosecutor's rebuttal was so lengthy—one and a half hours—and non-responsive as to amount to a second closing argument, permitting surrebuttal on the part of the defense. The judge had the discretion to limit the prosecutor's rebuttal and chose not to do so. In view of the complicated nature of the case, the rebuttal was not overly long. Considering all the circumstances of the case, neither the rebuttal argument nor the prosecutor's

remarks in any way violated defendant's due process rights.

C.

Defendant Arbogast argues that the trial court should have granted his second request for a continuance because his Montana trial ended shortly before the Pittsburgh trial began. In reviewing the trial court's decision, an appellate court will reverse the lower court only if the judge abused his discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Paullet v. Howard*, 634 F.2d 117, 119 (3d Cir. 1980) (per curiam). The factors a court should consider when presented with a motion for a continuance include: the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare his defense; and the rights of other defendants whose trials are delayed because of the continuance. *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214-15 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

In this instance, the trial court did not abuse its discretion. The judge's denial of the second continuance neither abridged Arbogast's right to due process nor was insupportable in light of the circumstances of the case.

Arbogast's reasons for seeking the continuance included giving him more time to prepare his defense and permitting him to be defended by counsel of his choice. Although this case is a fairly complex antitrust suit, Arbogast was aware of the general perimeters of the case against him when the district court first postponed the trial in October. Moreover, Arbogast discussed his defense for the Pittsburgh case with counsel during the Montana trial. Although Arbogast's first choice as counsel did not represent him in Pittsburgh, another lawyer from the same

firm took over the representation. Despite these circumstances, Arbogast had approximately two weeks to devote to his Pittsburgh defense. Courts have found no constitutional violation in appointment of counsel cases when the defendant and his attorney have had much less time to prepare. *Ungar*, 376 U.S. 575 (five days to answer show cause order); *United States ex rel. Chambers v. Maroney*, 408 F.2d 1186 (3d Cir. 1969) (counsel appointed on day of trial).

Additionally, the judge already had continued the trial once, for a period of several months. To have postponed this complicated trial again would not only have contributed to calendar congestion, but, more important, would have made the other defendants involved continue to wait to have their day in court.

D.

Sargent Electric, Lord Electric, Frederic Sargent, and Ralph Vryenhoek argue that the judge erred in giving instructions: (1) by shifting the burden of proof to the defendants by an instruction that price-fixing is *per se* illegal; (2) by failing to charge the jury fully on sham bidding; (3) by his instruction removing the element of intent from the jury's consideration; and (4) by his instruction on the "affecting commerce" theory pertaining to the interstate commerce element of the Sherman Act.

In evaluating the district court's ruling on points for charge, the standard of review is abuse of discretion. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 199 (3d Cir. 1970). Once the court has given an instruction, we must "determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues on the

case to the jury." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977); *see also United States v. Park*, 421 U.S. 658, 675 (1975). The trial court should be reversed only if the instruction was capable of confusing and thereby misleading the jury. *Idzojtic v. Pennsylvania Railroad Co.*, 431 F.1d 1029, 1036 (3d Cir. 1970) (Aldisert, J., dissenting). We now address defendants' contentions *seriatim*.

The Supreme Court repeatedly had held that *per se* violations require no proof of anticompetitive effect to constitute a violation of the Sherman Act. *Northern Pacific Railway*, 356 U.S. at 5; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940); *United States v. Trenton Potteries, Co.*, 273 U.S. 392, 396-97 (1927). Consequently, an instruction to this effect would "fairly and adequately" submit the issue to the jury. Moreover, this argument that the instruction creates an irrebuttable presumption has been considered and rejected by several jurisdictions. *See, e.g., United States v. Koppers Co.*, 652 F.2d 290, 293-96 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Manufacturers' Association of the Relocatable Building Industry*, 462 F.2d 49, 52 (9th Cir. 1972).

Sargent Electric argues that the court should have given a more complete instruction on sham bidding; it maintains that the instruction should have identified several aspects of USS's bidding procedures as potentially sham bidding and that the sham bidding instruction should have related to the rule of reason, rather than the *per se* approach. The judge's instructions, however, adequately presented the issue to the jury.

The court initially referred to sham bidding in general terms. The court then instructed the jury that if USS acquiesced in the allocation of contracts, they should find the defendants not guilty. The court thus presented the essence of the sham bidding defense to the jury, although not in terms of specific practices. Moreover, Sargent Electric never requested the court to give the instruction in any particular language. Thus, the court's failure to adopt language other than that which it used is not reversible because the instruction did not represent "plain error resulting in a manifest denial of justice." *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980).

Additionally, no reason existed for the judge to couple the sham bidding instruction with a reasonableness instruction. Price-fixing and bid rigging are *per se* violations. Defendant's conduct, even if USS were a monopsonist as defendant contends, did not fall in any "gray zone" requiring a reasonableness instruction. *See United States v. Giller*, 599 F.2d 541 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979). For the reasons stated above, the district court did not err in giving the challenged instruction.

Sargent Electric also alleges that the court's instructions removed consideration of the element of intent from the jury. The court instructed that no showing of specific intent to disobey the law or restrain trade or knowledge of the illegality of the activities was necessary and defendants could be convicted if they knowingly formed the conspiracy or knowingly joined the conspiracy. App. at 3722a. Prior to this, the court also instructed that intent could be proved by showing that the acts of the defendants had the effect of bid rigging and the acts were undertaken with knowledge of the bid rigging; or defendant's acts did not have any proscribed effects, but the defendants undertook

those acts with a conscious purpose of bringing about the proscribed effects. *Id.* at 3721a-11.

The trial court's instructions avoided the problems of presuming intent simply from the commission of certain acts discussed in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Here, the jury was asked to find not only that the defendants knowingly joined or formed the conspiracy, but that they also meant to bring about or did bring about the effects proscribed by the Sherman Act. Moreover, not only did the instructions follow the language accepted by this court, especially as to specific intent, *see United States v. Continental Group, Inc.*, 603 F.2d 444, 462-63 (3d Cir. 1979), but part of the instructions followed the exact language of defendants' proposed instruction No. 14. App. at 3819a. Viewed as a whole, the instructions were a correct statement of the law and fairly and adequately presented this issue to the jury.

Appellants also object to the jury instructions pertaining to the "affecting commerce" theory because the judge stated that the jury need only find that the commerce involved was substantial and that they did not have to find a rise in prices or a shift in commerce and the judge instructed that the government could satisfy either the in commerce or affecting commerce theory to prove the interstate commerce element of the Sherman Act. The court's instructions, however, correctly stated the law. *Per se* violations require no proof of an anti-competitive effect on commerce. *Northern Pacific Railway*, 356 U.S. at 5. Also, evidence that supports either theory pertaining to the interstate commerce element is sufficient to establish a Sherman Act violation. *McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

E.

Relying on *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), defendant Rodgers alleges prejudice because the district court failed to marshal the evidence against him. A trial court, however, need not marshal the evidence, especially if the trial is complex. *United States v. Gillilan*, 288 F.2d 796, 798-99 (2d Cir. 1961). Unlike *Kelly*, where the evidence did not connect the defendant to the single conspiracy charged, Rodgers suffered no prejudice by a failure to marshal the evidence because that evidence directly connected him to the conspiracy.

VIII.

We have carefully considered all contentions presented by the appellants. The judgment of the district court will be affirmed in all respects.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

**Nos. 84-3242, 84-3243, 84-3244,
84-3253, 84-3206, 84-3267 and 84-3268**

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

**Appeal from the United States
District Court for the Western
District of Pennsylvania-Pittsburgh**

Argued
October 3, 1984
Before: ALDISERT, *Chief Judge,*
HUNTER and WEIS, *Circuit Judges*

(Filed December 10, 1984)

ORDER AMENDING OPINION

It is hereby ordered that the opinion in the above, filed December 10, 1984, be amended as follows:

Page 10, lines 1 and 2: delete "Lord Electric and Sargent Electric" and substitute "Sargent Electric and Paul Arbogast".

Page 11, line 30: delete "Arbogast" and substitute "Lord Electric".

Page 12, line 1: delete "Arbogast" and substitute "Lord Electric".

Page 12, line 2: change "he" to "it".

Page 12, line 4: delete "Arbogast" and substitute "Lord Electric".

Page 12, line 12: delete "Arbogast" and substitute "appellant".

Page 12, line 18: delete "The Arbogast" and substitute "Lord Electric's".

Page 12, line 18: change "he" to "it".

Page 12, line 19: change "he" to "it" (twice).

Page 12, line 23: change "his" to "this".

Page 12, line 25: change "he" to "appellant".

Page 12, line 28: delete "Arbogast" and substitute "Lord Electric".

Page 23, line 29: change "he" to "it".

BY THE COURT

/s/ RUGGERO J. ALDISERT
Chief Judge

Dated: December 19, 1984

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

United States of America

v.

PAUL E. ARBOGAST

Docket No. CRIMINAL NO. 83-98

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date: 4/19/84.

Counsel: With Counsel—William Wycoff, *Esq.* & Clifford Levine, *Esq.*

Plea: Not Guilty. (Ct Rep T. Thomas)

There being a verdict of Guilty. Defendant has been convicted as charged of the offense(s) of:

COUNT I: Combining and conspiring in unreasonable restraint of interstate trade and commerce (15 U.S.C. § 1).

Sentence or Probation Order: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years and on condition that the defendant be confined in a jail type or treatment institution for a period of Three (3) months, the execution of the remainder of the

sentence of imprisonment is hereby suspended and the defendant placed on probation for a period of Four (4) years to commence upon the defendant's release from confinement, upon the following terms and conditions:

1. That defendant comply with all local, state and federal laws.

2. That defendant comply with rules and regulations of the probation department.

It is further adjudged that:

1. That defendant is ordered to pay a fine of $50,000.00, to be paid on or before May 21, 1984.

2. That defendant is ordered to pay 1/7 of the costs of prosecution on or before May 21, 1984.

In addition to the special conditions or probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ MAURICE B. COHILL, JR.,

DATE: 4/19/84

APPENDIX D

UNITED STATES OF AMERICA, *Plaintiff*

v.

FISHBACH AND MOORE, INCORPORATED, THE HOWARD P. FOLEY COMPANY, LORD ELECTRIC COMPANY, INC., SARGENT ELECTRIC COMPANY, E. C. ERNST, INC., TRI-CITY ELECTRIC COMPANY, INC., JOSEPH J. RODGERS, PAUL E. ARBOGAST, FREDERIC B. SARGENT, RALPH D. VRYENHOEK AND JAMES L. OESTERLE, *Defendants.*

Crim. No. 83-98

United States District Court
W.D. Pennsylvania
Dec. 22, 1983

OPINION

COHILL, *District Judge.*

I. Defendants' Motion for a Bill of Particulars

Defendants have moved, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure for a bill of particulars. In support of this motion, defendants argue that they need more information to 1) prepare their defenses, and 2) ascertain whether they may be prosecuted a second time in the future for the offenses presently charged. The defendants claim that the conspiracy alleged by the government covers a seven-year period and over 150 projects, but that the counts of the indictment are so general that defendants

are unable to ascertain which projects the government asserts were the subjects of the conspiracy, when the actions took place, or who was involved.

The government, in opposition to this motion, argues that defendants are not entitled to a script of the government's case; that case is a simple one involving bid rigging; that defendants have received the grand jury testimony of 28 witnesses and numerous documents and exhibits, and that defendants have access to all information necessary to prepare their defenses. The government has also claimed that all jobs bid for during this period are covered by the indictment as subjects of the conspiracy, and that the question of which particular jobs are involved is not relevant.

The defendants are entitled to more information as to the conspiracy and actions with which they are charged; we will therefore grant defendants' motion in part and deny it in part.

[1,2] We note at the outset that the granting of a bill of particulars is a matter within the discretion of the trial court, *Wong Tai v. United States,* 273 U.S. 77, 82, 47 S.Ct. 300, 302, 71 L.Ed 545 (1927), *United States v. Armocida,* 515 F.2d 49, 54 (3d Cir.) *cert. denied,* 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975). The purpose of a bill of particulars is to inform the defendant(s) of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise at trial, and to protect against a second prosecution for an inadequately described offense. *United States v. Addonizio,* 451 F.2d 49, 63-64 (3d Cir. 1971), *cert. denied,* 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972). *See also, Will v. United States,* 389 U.S. 90, 99, 88 582 F.2d 947, 951 (5th Cir.1978), *cert. denied,* 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979).

[3,4] It is well established that a bill of particulars is not to be used by the defendant as a discovery tool, *United States v. Litman*, 547 F.Supp. 645, 654 (W.D.Pa. 1982), by which defendants obtain disclosure of every detail of the theory and preparation of the government's case. *United States v. Boffa*, 513 F.Supp. 444, 485 (D.Del.1980). In ascertaining whether a bill of particulars is appropriate, the Court may consider not only the indictment, but also all of the information which has been made available to the defendants; *United States v. Kenny*, 462 F.2d 1205, 1212 (3d Cir.), *cert. denied*, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972); *United States v. Bloom*, 78 F.R.D. 591, 600-01 (E.D.Pa. 1977); *United States v. Azzarelli Construction Co.*, 459 F.Supp. 146, 151 (E.D. Ill.1978), *aff'd* 612 F.2d 292 (7th Cir.1979), *cert. denied*, 447 U.S. 920, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980); *United States v. Barrows*, 122 F.Supp. 324, 325 (D.Del. 1954).

The government has already provided defendants with "relevant portions" of the grand jury testimony of twenty-eight witnesses, relevant grand jury exhibits from released District of Columbia grand jury proceedings, relevant exhibits from the Pittsburgh grand jury proceedings, relevant documents subpoenaed in connection with these proceedings, and documents voluntarily produced to the government. The government has also stated that it will provide to defendants a list of unindicted co conspirators, as well as transcripts of relevant grand jury testimony of employees within the definition of Fed.R.Crim.P. (16(a)(1)(A).

[5] A significant amount of information has already been made available to defendants. An indictment under the Sherman Act is not required to be detailed or evidentiary in nature, since the basis of a conspiracy charge is

"agreement rather than action, and the agreement is usually established by a course of dealing or pattern of conduct and the reasonable inferences to be drawn therefrom" *United States v. Tedesco,* 441 F.Supp. 1336, 1340 (M.D.Pa. 1977) (citing *United States v. United States Steel Corp.,* 233 F.Supp. 148, 152 (S.D.N.Y. 1964)). Thus, overt acts need not be alleged in a Sherman Act conspiracy indictment, since the conspiracy itself is the nature of the crime. *Nash v. United States,* 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232 (1913).

In *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), the Supreme Court held that a legally sufficient indictment must state the elements of the offense charged with sufficient clarity to apprise the defendant of what he must defend against and accurately record the crime for which the individual may be convicted or acquitted to avoid a second jeopardy of the same offense. Id. at 763-64, 82 S.Ct. at 1046-47.

[6] Having considered this standard, the arguments of counsel, the indictment itself, and the information already in defendant's possession as well as what the government has promised to supply, we remain concerned with the number of projects bid on over the seven-year period during which the conspiracy allegedly took place. The "Western Pennsylvania Works" (as noted in footnote 1 hereof) comprises a number of plants. Some 150 contracts were bid on. We do not believe that it will unreasonably limit the government's case to require identification of which contracts are alleged to be the subject of the conspiracy to allocate bids among defendants, having bid prices fixed, or for which noncompetitive, collusive and rigged bids were

submitted, and/or on which defendants and co-conspirators refrained from bidding pursuant to the alleged conspiracy. (Defendants' Motion for Bill of Particulars, § 6(b)). Disclosure of this information should be sufficient to allow defendants to prepare for trial without "freezing" the government's proof. We will, therefore, grant § 6(b) of the defendants' Motion for a Bill of Particulars, and deny the other requests included in that Motion.